

AMENDED INITIAL STATEMENT OF REASONS (Additions are displayed in bold underlined text.)

Government Code section 12930, subdivision (f)(1)-(2), grants the Department of Fair Employment and Housing (DFEH or department) the function and power to receive, investigate, and conciliate complaints of discriminatory practices made unlawful by the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900, et seq.), the Unruh Civil Rights Act (Civ. Code, § 51), the Ralph Civil Rights Act (Civ. Code, § 51.7), and the Disabled Persons Act (Civ. Code, § 54, et seq.). Article 1 of Chapter 6 of the FEHA sets forth the general procedure for enforcement by the department of the FEHA's prohibition against unlawful employment practices. (Gov. Code, §§ 12960 through 12976.) (Article 1 also is applicable to Unruh and Ralph Civil Rights Acts and Disabled Person Act complaints filed with the department.) Article 2 of Chapter 6 of the FEHA sets forth the general procedure for enforcement by the department of the FEHA's prohibition against housing discrimination. (Gov. Code, §§ 12980 through 12989.3.)

When it was created by the Legislature in 1980, the DFEH also was granted the statutory authority to adopt regulations to carry out its duties and functions. To date, the department has not adopted the regulations the Legislature contemplated, although it has developed procedures of general application (DFEH Directives) for processing complaints of discrimination filed by members of the public. Many of the department's procedures of general application fall outside any express statutory exemption to the rulemaking requirements of the Administrative Procedure Act (APA) (Gov. Code, § 11340, et seq.) and APA Regulations (Cal. Code Regs., tit. 1, §§ 1-280).

The purpose of these proposed regulations is to provide duly noticed and vetted procedures of general application for participation in the DFEH administrative process. In most cases, the proposed regulations capture existing procedures currently utilized by the department. Where applicable, the proposed regulations will replace currently controlling DFEH Directives.

The specific purpose **and necessity** for each of the department's proposed procedural regulations is explained in full below.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS.

The department did not rely on any technical, theoretical, or empirical studies, reports, or documents in proposing the adoption of its regulations.

REASONABLE ALTERNATIVES TO THE REGULATIONS AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The proposed regulations capture existing procedures utilized by the department. To date, no other alternatives were presented to or considered by the department. The department invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearings or during the written comment period.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESSES

The proposed regulations capture existing procedures utilized by the department for accepting, investigating, and conciliating complaints of employment, housing, and public accommodation discrimination and incidents of hate violence filed against individuals and businesses. The proposed regulations impose no duties or obligations not already imposed by existing law. Thus, the department anticipates that the regulations should not impose any adverse impact on small businesses. To the contrary, adoption of the proposed regulations is anticipated to benefit small and large businesses alike by clarifying the department's procedure and making it easier for individuals and businesses named in complaints to participate in proceedings before the department. Because the department does not anticipate any adverse impact to small businesses, it has not identified any alternatives that would lessen such impact.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The department anticipates that adoption of the proposed regulations will have no significant statewide adverse economic impact directly affecting business. The proposed regulations capture existing procedures utilized by the department. It is anticipated that no additional costs beyond those imposed by the existing statute, Government Code section 12900 et seq., and existing procedures utilized by the department, will be imposed. To the contrary, adoption of the proposed regulations is anticipated to benefit businesses throughout the state by clarifying and streamlining the department's procedure, thereby making it easier and less costly for businesses named in complaints to participate in proceedings before the department.

Detailed reasons for each of the department's proposed procedural regulations are set forth below:

Section 10000. Statement of Purpose

Government Code section 12930(f) grants the department the function and power to receive, investigate, and conciliate hate crime complaints and complaints of discriminatory practices in employment, housing, and public accommodations. Government Code sections 12960 through 12976 and 12980 through 12989.3 set forth the general procedures by which the department enforces the FEHA's prohibition against discriminatory practices. Government Code section 12930(e) authorizes the department to adopt suitable rules and regulations to carry out its functions and duties.

The purpose of this regulation is to articulate that, along with the applicable provisions of the Fair Employment and Housing Act **noted above**, the department's procedural regulations comprise the rules governing all proceedings before the department.

This proposed regulation is necessary because it identifies the purpose of the department's procedural regulations that follow and clarifies that, along with the applicable provisions of the FEHA itself, it is the department's procedural regulations (as opposed to the Directives they replace) that comprise the rules governing all proceedings before the department.

Section 10001. Definitions

This regulation defines terms commonly used throughout the department's procedural regulations. **In this way, the regulations need not be so lengthy and repetitive. The regulation further is necessary because the defined terms either are not commonly used outside the context of a DFEH proceeding or have a different meaning or meanings when used outside this context.** The defined terms include:

Section 10001, Subsection (a) - Accusation

This section defines an accusation as the charging document issued by the department pursuant to section 12965 or 12981 of the Government Code. The department's proposed definition is the same as that adopted by the Fair Employment and Housing Commission in its procedural regulations.

This section is necessary because it provides the meaning of "accusation," as used in the FEHA and within the context of a DFEH proceeding, which is different than the commonly understood meaning of "accusation."

Section 10001, Subsection (b) - Authorized signature

This section identifies the individuals whose signature the department will accept for filing a complaint on behalf of a complainant alleging a violation of the FEHA. It is necessary because it includes individuals whom one might not suspect have the authority to sign a DFEH complaint on behalf of another (such as the parent, child, or sibling with an interest in the estate of a deceased complainant, or any person whom the complainant has identified in writing as a person authorized to sign a complaint). This broad interpretation is necessary to effectuate the purposes of the FEHA.

Section 10001, Subsection (c) - Commission

The definition of “Commission” was originally noticed to the public, but was deleted prior to the first 15-day public comment period.

Section 10001, Subsection (c) (formerly Subsection (d))- Complainant

This section defines a complainant as a person claiming to be aggrieved by a practice unlawful under any of the laws the department enforces, who files a complaint of discrimination with the department. This section is necessary because it provides the meaning of a word the department uses throughout the proposed regulations to concisely convey the foregoing, and define a term that may be unfamiliar to the public.

Section 10001, Subsection (d) (formerly Subsection (e))-Complaint

This section states that “complaint,” as used in the department’s procedural regulations, means a complaint of discrimination filed with the department. This section is necessary because it provides the meaning of “complaint,” as used in the FEHA and within the context of a DFEH proceeding, which is different than the commonly understood meaning of “complaint.”

Section 10001, Subsection (e) (formerly Subsection (f)) – Conciliation

This section defines conciliation, as used in the FEHA, as including pre-determination settlement negotiations and post-investigation conciliation and/or settlement conferences conducted by the department’s enforcement division. This section is necessary because it provides the meaning of an undefined word used throughout the FEHA and the department’s proposed regulations, which is either unfamiliar to the public or, if familiar, likely has a different meaning.

Section 10001, Subsection (g) – Continuing Violation

The definition of “continuing violation” was originally noticed to the public, but was deleted prior to the first 15-day public comment period.

Section 10001, Subsection (h) - Co-respondent

The definition of “co-respondent” was originally noticed to the public, but was deleted prior to the first 15-day public comment period.

Section 10001, Subsection (f) (formerly Subsection (i)) – Department

This section clarifies that “department” means the Department of Fair Employment and Housing and includes any officer, employee, or other individual delegated any function, power, or duty of the department. This section is necessary because it makes clear that, when used throughout the FEHA and the proposed regulations, “department” means the Department of Fair Employment and Housing, as opposed to another state department.

Section 10001, Subsection (g) (formerly Subsection (j)) – Departmental Appeal

This section identifies the process by which an aggrieved party may request that the department reconsider its rejection of the aggrieved party’s complaint or closure of his or her case. This section is necessary because it gives meaning to the term “departmental appeal,” which is a term likely unfamiliar to the public that the department uses to identify the process by which a complainant or respondent may appeal a department decision.

Section 10001, Subsection (h) (formerly Subsection (k))– Director

This section clarifies that “director” means the director of the Department of Fair Employment and Housing and includes any officer, employee, or other individual delegated any function, power, or duty of the director. This section is necessary because it makes clear that, when used throughout the FEHA and the proposed regulations, “director” means the director of the Department of Fair Employment and Housing, as opposed to the director of another state department.

Section 10001, Subsection (i) (formerly Subsection (l)) – District Administrator

As originally proposed, this section defined “district or regional administrator.” As modified, this section provides the meaning of “district administrator, (“regional administrator” is now set out in a separate definition) which is any employee, officer, or other individual delegated the

authority to supervise the staff and day-to-day operations of a department district, field or regional office. Inclusion of this definition in the department's proposed regulations is necessary to identify the scope of authority and duties of these DFEH employees, referred to throughout the proposed regulations, who are charged with carrying out many of the department's statutory functions. The department finds it necessary to define this term, with which the public is not readily familiar.

Section 10001, Subsection (j) – EEOC

The definition of this acronym, which stands for the United States Equal Employment Opportunity Commission, used in the FEHA and the proposed regulations, is necessary to inform those members of the public who are unfamiliar with the full name of the DFEH's federal counterpart for employment discrimination complaints.

Section 10001, Subsection (k) – Enforcement Division

This definition is necessary because the term “enforcement division,” used throughout the proposed regulations to refer to the division of the department that files, investigates and conciliates complaints, and its meaning within the context of a DFEH proceeding, either are unfamiliar to the public, or if familiar, have a different meaning.

Section 10001, Subsection (l) (formerly Subsection (n)) – File or To File

This section states that except for complaints created on the Internet via the department's automated right-to-sue notice, a complaint is “filed” with the department when it is date-stamped “received” by the department. This section is necessary because it defines the term within the meaning of the FEHA, and describes how the act of filing a complaint with the DFEH is accomplished, which may differ from the commonly understood meaning of “to file.” Inclusion of this definition is particularly important because a statute of limitations applies to filing a complaint with the department, and because filing triggers the limitations period for the department to investigate a complaint and issue an accusation.

Section 10001, Subsection (m) – District Office

The definition of “district office” was originally noticed to the public, but was deleted prior to the 15-day public comment period.

Section 10001, Subsection (m) – HUD

The definition of this acronym, which stands for the United States Department of Housing and Urban Development, used in the FEHA and the proposed regulations, is necessary to inform those members of the public who are unfamiliar with the full name of the DFEH's federal counterpart for housing discrimination complaints.

Section 10001, Subsection (n) – Legal Division

This definition is necessary to define the unique duties of the DFEH's legal division, which are referred to throughout the proposed regulations. The duties of the DFEH's legal division, i.e., issuing and prosecuting accusations and civil complaints, are not well known outside the department.

Section 10001, Subsection (o) – Housing Accommodation

The definition of “housing accommodation” was originally noticed to the public, but was deleted prior to the first 15-day public comment period.

Section 10001, Subsection (o) – Mediation Division

This definition is necessary to define the role of a new division of the department, referred to throughout the text of the proposed regulations, with which the public is unfamiliar. The mediation division, separate from the enforcement and legal divisions, employs trained neutrals to mediate complaints filed with the department when the parties agree to mediate.

Section 10001, Subsection (p) - Protected Activity

The definition of “protected activity” was originally noticed to the public, but was deleted prior to the 15-day public comment period.

Section 10001, Subsection (p) – Pre-determination

This definition, added in response to a written comment, is necessary to provide the technical meaning of “pre-determination” (i.e., before the department has determined whether a complaint of discrimination has merit) within the context of a DFEH proceeding.

Section 10001, Subsection (q) - Protected Basis

This section defines “protected basis” as any basis or characteristic upon which discrimination is prohibited by the FEHA, the Unruh Civil Rights Act, the Ralph Civil Rights Act, or any other law the department enforces. This section is necessary because it provides the technical meaning of a “short-hand” term used throughout the department’s proposed regulations to refer to all

the characteristics listed, or found by courts to be covered, as bases upon which discrimination is prohibited under laws the DFEH enforces.

Section 10001, Subsection (r) (formerly combined with District Administrator in former Subsection (l))– Regional Administrator

A “regional administrator” is responsible for managing the day-to-day operations of a regional office or multiple district or satellite offices. Inclusion of this definition in the department’s proposed regulations is necessary to identify the scope of authority and duties of these DFEH managers, referred to throughout the proposed regulations, who are charged with carrying out many of the department’s statutory functions.

Section 10001, Subsection (s) (formerly subsection (r)) – Registered Complaint

This section explains that a “registered complaint” means a filed complaint to which the department has assigned a department case file number. This section is necessary because it provides the meaning of a technical term, with which the public likely is unfamiliar, whose meaning may differ outside the context of a DFEH proceeding.

Section 10001, Subsection (t) (formerly Subsection (s))– Respondent

This section defines “respondent” as an entity or individual alleged to have committed a practice made unlawful by a statute the department enforces, and against whom a complaint of discrimination has been filed with the department. This definition is necessary because it provides the meaning of a term used throughout the department’s proposed regulations, to concisely convey the foregoing, and define a term that is either unfamiliar to the public, or if familiar, has a different meaning.

Section 10001, Subsection (u) – Verified complaint

This section provides the definition of the term “verified complaint,” which means a complaint submitted to the department with the complainant’s oath or affidavit, stating that to the best of his or her knowledge, all information contained in the complaint is true and correct, except matters stated on information and belief, which the complainant declares he or she believes to be true. To be “verified” a complaint filed with the department need not be signed; verification need only confirm the truth of the allegations submitted, including by submitting the allegations under penalty of perjury. This definition is necessary to provide the meaning within the context of a DFEH proceeding of “verified complaint,” an undefined term used in the FEHA and the Department’s proposed procedural regulations.

Subchapter 1. Employment, Unruh Civil Rights Act, Ralph Civil Rights Act, and Disabled Persons Act Complaints

Section 10002. Filing a Complaint of Employment Discrimination with the Department

Government Code section 12960(b) authorizes any person claiming to be aggrieved by an alleged unlawful employment practice to file a verified complaint of discrimination with the department stating “the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, *...that shall set forth the particulars thereof and contain other information as may be required by the department.*” [Emphasis added.] Government Code section 12960(d) provides the statute of limitations, and limited circumstances when this period may be extended, for filing a complaint of discrimination with the department.

This regulation clarifies and makes specific the “particulars” mentioned in Government Code section 12960(b) that must be included in a complaint of employment discrimination filed with the department. The regulation also specifies the “other information” the department requires a complainant of employment discrimination include. The proposed regulation also: (1) expressly incorporates the statute of limitations, and limited circumstances when this period may be extended, set forth in Government Code section 12960(d); (2) alerts the reader that sections 10006 and 10018 of the department’s proposed regulations also allow for extension of the limitations period; and (3) sets forth the procedure for determining the date a complaint has been filed with the department (“filing date”).

This regulation is necessary because it provides the “particulars” and “other information” mentioned in Government Code section 12960(b), which must be included in a complaint of employment discrimination filed with the department. The required information—not specified elsewhere in the FEHA—is necessary to streamline the administrative process and preserve complainants’ claims.

Section 10003. Liberal Construction of Complaints

Government Code section 12920 declares “as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination” on account of any basis or characteristic listed in the FEHA. Government Code section 12921(a) declares that the opportunity to seek, obtain and hold employment without discrimination is a civil right. Government Code section 12930(f)(1) gives the department the power to receive, investigate, and conciliate complaints alleging practices made unlawful by the FEHA, while section 12960(b) gives to any person claiming to be aggrieved by an alleged unlawful employment practice

the right to file a complaint of discrimination with the DFEH. Section 12993(a) of the Government Code provides that the provisions of the FEHA prohibiting discrimination shall be “construed liberally for the accomplishment of the purposes” of the FEHA.

This regulation implements, interprets, and makes specific sections 12920, 12921(a), and 12993(a) of the Government Code in their application to the construction of complaints of employment discrimination filed with the department. **It is necessary to protect the rights of complainants—especially those who are unrepresented and/or unable to clearly articulate their claims—and formalize the department’s procedure of liberally construing employment discrimination complaints to effectuate the purpose of the FEHA. Section 12960 itself is silent on the broad manner in which the department must construe complaint allegations.**

Section 10004. Categories of Employment Discrimination Complaints Accepted by the Department for Filing

Government Code section 12930(f)(1) gives the department the power to receive, investigate, and conciliate complaints alleging practices made unlawful by the FEHA, while section 12960(b) gives to any person claiming to be aggrieved by an alleged unlawful employment practice the right to file a complaint of discrimination with the DFEH.

This regulation clarifies and makes specific section 12960 of the Government Code by articulating the three categories of employment discrimination complaints accepted for filing by the department: (1) complaints filed for investigation; (2) complaints taken for filing purposes only, which are not investigated; and (3) complaints filed to request an immediate right-to-sue.

This regulation provides the three categories of employment discrimination complaints the department has determined are necessary to meet the needs of all complainants, regardless whether a complainant seeks to file a complaint for investigation or wishes to forgo the investigation and request an immediate right-to-sue. A third category is necessary to protect the rights of complainants over whose allegations the department lacks jurisdiction. Because these categories of complaints are not identified in the FEHA, this regulation is necessary both to inform the public and formalize the department’s complaint filing procedures.

Section 10005. Obtaining a Right-to-Sue Notice From the Department

Government Code section 12965(b) provides that if the DFEH does not issue an accusation “within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue,” the department must notify the employment discrimination complainant that it will issue a right-to-

sue notice to him or her upon request. The statute further provides that if the complainant does not request a right-to-sue notice, the department is required to issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint.

This regulation clarifies that a complainant may forgo having the department investigate his or her complaint of employment discrimination and instead obtain an immediate right-to-sue. The proposed regulation also specifies the procedures for requesting an immediate right-to-sue notice from the department. Additionally, the regulation clarifies that, when the notice has not earlier been requested, the department must issue a right-to-sue notice at the completion of its investigation or one year after the complaint is filed, whichever occurs first.

The proposed regulation is necessary because it both informs the public and formalizes the department's procedure of issuing an immediate right-to-sue upon request. Approximately half the complaints filed with the department are filed by individuals who seek an immediate right-to-sue, so that they may go directly to court; they do not wish to have the department investigate their allegations. In addition, the regulation articulates the specific procedures for requesting an immediate right-to-sue from the department under section 12965(b), procedures that are not articulated in the statute.

Section 10006. Filing a Complaint with the Department Alleging a Violation of the Unruh Civil Rights Act, Ralph Civil Rights Act, or Disabled Persons Act

Government Code section 12930(f)(2) gives the department the power to receive, investigate, and conciliate complaints alleging a violation of the Unruh Civil Rights Act (Civ. Code, § 51), the Ralph Civil Rights Act (Civ. Code, § 51.7), and the Disabled Persons Act (Civ. Code, § 54 et seq.). Civil Code sections 52(f) and 54.3(b) provide an individual aggrieved by an alleged violation of Civil Code sections 51, 51.7 and 54 et seq. the right to file a complaint of discrimination with the department.

This regulation implements, interprets, and makes specific Government Code section 12930(f)(2) by articulating the department's procedures that apply to Civil Code section 51, 51.7 and 54 complaints that do not allege housing discrimination over which the HUD has concurrent jurisdiction. This regulation also clarifies that the department does not issue a right-to-sue notice when it closes a complaint alleging a violation of Civil Code section 51, 51.7 or 54 as a complainant does not need a right-to-sue from the department to file a corresponding civil court action for the same alleged violation(s).

This regulation is necessary because it both informs the public and formalizes the department's procedures applicable to Civil Code sections 51, 51.7 and 54 complaints that do not allege housing discrimination. This regulation further is necessary because it clarifies that the department does not issue a right-to-sue notice for complaints alleging a violation of Civil Code sections 51, 51.7 and/or 54, a point that is not made clear in the FEHA. Nor is it clear from the statute which department procedures apply to these complaints when they do not allege housing discrimination. This regulation, specifying that the department's procedures for processing employment discrimination complaints apply, solves that problem.

Section 10007. Intake

Government Code section 12930(f)(1)-(2) gives the department the function and power to receive complaints alleging practices made unlawful by the FEHA, Unruh Civil Rights Act, Ralph Civil Rights Act or Disabled Persons Act. Sections 52(f) and 54.3(b) of the Civil Code and section 12960(b) of the Government Code give to any person victimized by employment discrimination, or a violation of Civil Code section 51, 51.7 or 54, the right to file a complaint of discrimination with the DFEH. Government Code section 12960(b) articulates some of the particulars a complainant must include in a complaint of discrimination filed with the department. Government Code section 12960(d) provides the statute of limitations, and limited circumstances when this period may be extended, for filing an employment or Civil Code section 51, 51.7 or 54 complaint with the department.

This regulation implements sections 12930(f) and 12960(b) & (d) of the Government Code by articulating: (1) the department's intake procedure for complainants alleging employment discrimination or a violation of Civil Code section 51, 51.7 or 54 et seq.; (2) the process for making an intake appointment with the department as a precursor to filing with the department a complaint alleging employment discrimination or a violation of Civil Code section 51, 51.7 or 54 et seq.; and (3) the information a complainant must provide the department prior to intake so the department may determine whether it has jurisdiction over the complainant's allegations.

This regulation is necessary because it both informs the public and formalizes the department's intake procedures for employment discrimination complaints. Intake procedures, which are necessary to determine whether a complaint can be accepted for investigation, are not articulated in the FEHA. The regulation provides for telephonic intake interviews. The department has moved from in-person intake interviews for complainants alleging employment discrimination to telephone intake interviews, which has eliminated the need for conference rooms, reduced office space and decreased overhead costs. The regulations also specifies information the department requires complainants to provide in advance of

their intake appointments, which streamlines the process and makes it more efficient for the public and the department.

Section 10008. Priority Intake

This regulation further implements sections 12930(f) and 12960(b) & (d) of the Government Code by articulating the circumstances under which the department may give a particular complainant priority over other complainants for the purpose of scheduling an intake appointment.

This regulation is necessary because it informs the public and formalizes the department's procedure for prioritizing intake appointments for complainants alleging employment discrimination. The department has discretion to determine the circumstances under which a particular complainant may be given priority over others for an intake interview. This regulation will help ensure that the public is aware of these circumstances, which are not articulated in the FEHA, and that complainants in priority circumstances—such as those whose statute of limitations will run in 30 days are less—are given priority so that their right to file is not lost.

Section 10009. Drafting Complaints Filed for Investigation

Government Code section 12930(f)(1)-(2) gives the department the function and power to receive and investigate complaints alleging employment practices made unlawful by the FEHA and violations of the Unruh and Ralph Civil Rights Acts and Disabled Persons Act. Civil Code sections 52(f) and 54.3(b) as well as Government Code section 12960(b) authorize any person claiming to be aggrieved by an alleged unlawful employment practice or Unruh or Ralph Civil Rights Acts or Disabled Persons Act violation to file a verified complaint of discrimination with the department. Government Code section 12960(b) also articulates some of the particulars that must be included in the complaint.

This regulation implements, interprets, and makes specific Government Code sections 12930(f) and 12960(b) by articulating that: (1) it is the department that shall draft the language of each complaint filed with it for investigation; (2) the complaint shall be taken on a complaint form prescribed by the department; (3) the complaint shall contain all the information identified in section 12960(b) of the Government Code and sections 10002 and 10007 of the department's regulations; (4) the complaint shall set forth the allegations in ordinary and concise language of the department's choosing; and (5) the department shall liberally construe the facts alleged by a complainant when drafting a complaint and include all relevant claims supported by the facts alleged.

This regulation provides the procedure by which the department drafts employment discrimination complaints. A specific procedure is necessary for conformity, to streamline the complaint process, and to

ensure timely complaint filing. This regulation both informs the public and formalizes the department's procedure for drafting employment discrimination complaints, a matter about which the FEHA is silent.

Section 10010. Written Statement or Correspondence as Complaint

This regulation further implements, clarifies, and makes specific Government Code sections 12930(f) and 12960(b) & (d) by articulating the limited circumstances that may lead the department to initially accept a written statement or correspondence from a complainant, in lieu of a complaint on a form prescribed by the department, for filing.

This regulation, too, is necessary because it informs the public and formalizes the department's procedure by articulating the limited circumstances that may lead to the acceptance of a written statement or correspondence from a complainant for initial filing, in lieu of a complaint prepared in accordance with section 10009. This regulation would be of particular importance to plaintiffs' attorneys and advocates who, because of their clients' special needs or circumstances, may seek to file a written statement or correspondence on behalf of a client who is unable to do so himself or herself, to preserve the client's rights.

Section 10011. Complaints Taken For Filing Purposes Only

This regulation further implements, interprets, and makes specific Government Code sections 12930(f)(1) and 12960(b) by articulating the procedure applicable when the department must reject at intake all or some of the allegations presented by an individual who seeks to file an employment discrimination complaint for investigation by the department.

Similarly, this regulation is necessary because it both informs the public and provides the procedure the department utilizes when it is necessary to reject all or some of a complainant's employment discrimination allegations at intake. Frequently, complainants seek to file complaints that are beyond the statute of limitations or are outside the department's jurisdiction. To preserve these claimants' rights, the department takes a complaint for filing purposes only, which is not investigated. This circumstance arises frequently; however it is a circumstance the FEHA does not address.

Section 10012. Director's Complaints

Government Code section 12960(b) authorizes the director of the DFEH to make, sign, and file a verified complaint of discrimination stating the name and address of the person, employer, labor organization, or employment agency alleged to have committed an unlawful employment practice. Pursuant to

Government Code section 12961, where an alleged unlawful employment practice adversely affects in a similar manner, or raises questions of law or fact common to, a group or class of applicants or employees, the director may file the complaint on behalf and as representative of such a group or class.

This regulation implements, interprets, and makes specific Government Code sections 12960(b) and 12961 by articulating the department's procedure governing director's complaints alleging employment discrimination, including a non-exhaustive list of factors the department may consider when determining whether to file a director's complaint.

This regulation is necessary because it both informs the public and formalizes the department's procedure for issuance of a director's complaint alleging employment discrimination, including a non-exhaustive list of factors the department has determined warrant the filing of a director's complaint. Section 12960(b) authorizes the filing of a director's complaint, but is silent regarding applicability and procedure.

Section 10013. Class or Group Complaints

Pursuant to Government Code section 12961, where an alleged unlawful employment practice adversely affects in a similar manner, or raises questions of law or fact common to, a group or class of applicants or employees of which the aggrieved person is a member, the aggrieved person or the director may file a complaint on behalf and as representative of such a group or class. Government Code section 12965(a), pertaining to accusations, provides that "for any complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, and accusation pursuant to Section 12961, an accusation shall be issued, if at all, within two years after the filing of the complaint."

This regulation implements, interprets, and makes specific Government Code sections 12961 and 12965(a) by articulating the department's procedure governing class complaints alleging employment discrimination, including a non-exhaustive list of factors the department may consider when determining whether to file a class complaint.

Similarly, this regulation both informs the public and formalizes the department's procedure for issuance of a class or group complaint alleging employment discrimination. It includes a non-exhaustive list of factors the department has determined warrant the filing of a class or group complaint. Although section 12961 authorizes class and group complaint filings, it gives only general guidance regarding applicability and procedure. The department's recent focus on group and class complaints to increase efficiency and broaden impact make this regulation a necessity.

Section 10014. Retaliation Complaints – Special Considerations

Government Code section 12930(f)(1) gives the department the function and power to receive and investigate complaints alleging employment practices made unlawful by the FEHA, while section 12960(b) authorizes any person claiming to be aggrieved by an alleged unlawful employment practice to file a verified complaint of discrimination with the department. Under Government Code section 12940(h), it is an unlawful employment practice to retaliate against any person because the person has opposed any practices the FEHA forbids, or because the person has filed a complaint, testified, or assisted in any proceeding before the DFEH or Fair Employment and Housing Commission.

This regulation implements, interprets, and makes specific sections 12930(f)(1) and 12960(b) of the Government Code, in their application to allegations of retaliatory employment practices, by articulating the department's filing procedure for retaliation complaints.

The proposed regulation is necessary because it both informs the public and formalizes the department's filing procedures applicable to complaints alleging retaliatory employment practices. The statute is silent on filing procedures specific to retaliation allegations, which, depending upon the facts and circumstances, may be included with other allegations in an initial complaint, filed separately in a subsequent complaint, or included via amendment to an initial complaint when the statute of limitations has run. The department has determined that the procedures set forth in this regulation afford complainants the greatest protection of their right to file a retaliation complaint for investigation.

Section 10015. Medical Information – Special Considerations [formerly Disability Complaints – Special Considerations]

Government Code section 12930(f)(1) gives the department the function and power to receive and investigate complaints alleging employment practices made unlawful by the FEHA, while section 12960(b) authorizes any person claiming to be aggrieved by an alleged unlawful employment practice to file a verified complaint of discrimination with the department. Under Government Code section 12940(a), it is an unlawful employment practice to discriminate against an applicant or employee because of his or her disability **or sex (which includes pregnancy)**. Similarly, under Government Code section 12940(m), it is an unlawful employment practice to deny an applicant or employee with a disability a reasonable accommodation. **Likewise, it is a violation of Government Code section 12945.2 to deny an eligible employee protected leave for the employee's own serious health condition or the serious health**

condition of a specified family member. To thoroughly investigate and evaluate these allegations, the department requires medical information.

This regulation implements, interprets, and makes specific sections 12930(f)(1) and 12960(b) of the Government Code, in their application to **complaint allegations that require the department to obtain and analyze medical information**, by articulating that complainants **who make these allegations** must authorize the department in writing to request and obtain copies of all **directly** relevant medical **records or** information **reasonably** necessary to evaluate and prosecute the complaint, **which the department will maintain confidential during the investigation.**

This regulation is necessary because it both informs the public and formalizes the department's procedure for obtaining and safeguarding a complainant's medical information when medical information is necessary to investigate and evaluate a complaint of employment discrimination, a matter about which the FEHA is silent. The department has determined that the procedures set forth in this regulation provide the proper balance between protecting complainants' right to privacy and the department's statutory duty to fully investigate a complaint of discrimination.

Section 10016. Standard for Accepting Complaint When Act of Harm Occurred Outside California

This regulation further implements, interprets, and makes specific sections 12930(f)(1) and 12960(b) of the Government Code by articulating that, where all other jurisdictional requirements have been met for filing a complaint for investigation with the department, and the act of harm occurred outside California, the department shall accept the complaint if a connection can be established between the complainant and some act of the respondent that occurred within California.

This regulation is necessary because it both informs the public and formalizes the department's procedure for determining whether to accept a complaint when the act of harm occurred outside California, an issue that arises with some frequency but about which the FEHA is silent. Accepting a complaint when this connection can be established helps ensure that the department applies the FEHA liberally to effectuate its purposes.

Section 10017. Effect of Prior Waiver Agreement/Release of All Claims

Government Code section 12920 recognizes that "the practice of denying employment opportunity and discriminating in the terms of employment... deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general." Section 12920 also states that it is the

purpose of the FEHA “to provide effective remedies that will eliminate these discriminatory practices.” Government Code section 12930(f)(1) gives the department the power to receive, investigate, and conciliate complaints alleging practices made unlawful by the FEHA, while section 12960(b) gives to any person claiming to be aggrieved by an alleged unlawful employment practice the right to file a complaint of discrimination with the DFEH.

This regulation implements, interprets and makes specific the application of Government Code section 12920 to sections 12930(f)(1) and 12960(b) of the Government Code by articulating the factors the department considers when determining whether to pursue a complaint when a complainant has executed a prior valid waiver or release of all claims. Such factors include, but are not limited to, whether the complaint alleges an unlawful systemic policy or practice that adversely affects a large number of employees.

This regulation is necessary because it both informs the public and formalizes the department’s procedure for determining whether to pursue a complaint when a complainant has executed a prior valid waiver or release of all claims. This issue arises frequently in employment discrimination investigations and is an issue about which the statute is silent. This regulation will inform the public about the limited applicability of prior waivers to department investigations. Further, this regulation will help ensure the appropriate balance between parties’ right to contract for closure and the department’s obligation to investigate, notwithstanding a prior valid waiver, on behalf of similarly situated employees.

Section 10018. Complaints Taken After Expiration of Statute of Limitation Due to Department Error

Government code section 12960(d) provides that no complaint of discrimination may be filed with the department “after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, except that this period may be extended” under the limited circumstances 12960(d) specifies. In *Dept. Fair Empl. & Hous. v. Cairo*, the Fair Employment and Housing Commission held that the one-year statute of limitation for filing a complaint also may be tolled when the department misleads a complainant about filing obligations, commits errors in processing a complaint for filing, or improperly discourages or prevents a complainant from filing at all. (*Dept. Fair Empl. & Hous. v. Cairo* (Jan. 6, 1984) No. 84-04, FEHC Precedential Decs.1984-85, CEB 3 [1984 WL 54284 (Cal.F.E.H.C.)].)

This regulation implements and makes specific the application of the Commission’s holding in *Dept. Fair Empl. & Hous. v. Cairo* to the statute of limitations set forth in Government Code section 12960(d).

This regulation is necessary because it informs the public of a little-known precedential Fair Employment and Housing Commission decision, which the department must follow when applicable, to accept an employment discrimination complaint for filing when the statute of limitations has run due to department error or neglect. Issuance of this regulation will put respondents on notice and help ensure that a party's right to file is not lost due to department error or omission.

Section 10019. Complaints Dual-filed with EEOC

The department has a work-sharing agreement with the EEOC pursuant to which the EEOC pays the department a specified amount per complaint for processing complaints of employment discrimination over which the EEOC has concurrent jurisdiction. Such complaints are given both an EEOC and a DFEH case number and are, thus, "dual-filed."

This regulation implements, interprets and makes specific the application of Government Code sections 12930(f)(1), 12960(b), and 12963 of the Government Code to: (1) the DFEH's receipt of complaints over which the EEOC has concurrent jurisdiction; and (2) the department's rejection of complaints where the same protected bases, discriminatory acts, and allegations have been included in a complaint the aggrieved party previously filed with the EEOC against the same respondent(s).

This regulation is necessary because it both informs the public and formalizes the department's procedure for accepting complaints over which the EEOC has concurrent jurisdiction. The FEHA is silent on the procedural relationship between the DFEH and the EEOC when complaints are dual-filed. The department's retention of complaints for investigation under state law, even when the EEOC has concurrent jurisdiction, ensures that complainants are afforded the broadest protections applicable under law and helps maintain the department's federal funding. Conversely, rejecting complaints that previously have been filed with the EEOC preserves the department's resources and prevents unnecessary duplication of efforts.

Section 10020. Complaints Transferred to EEOC for Processing

This regulation further implements, interprets and makes specific the application of Government Code sections 12930(f)(1), 12960(b), and 12963 of the Government Code to the DFEH's receipt of complaints over which the EEOC has concurrent jurisdiction. In particular, this regulation specifies the circumstances under which a complaint filed for investigation with the department may be transferred to the EEOC for investigation.

This regulation is necessary because it both informs the public and formalizes the department's procedure for determining when a complaint filed for investigation with the department will be transferred to the EEOC for investigation. The FEHA likewise is silent on each organization's respective responsibility when a complaint is dual-filed. The department has determined that transferring an investigation to the EEOC in the circumstances identified in this regulation affords complainants the broadest protections applicable under law.

Section 10021. Service of Complaints

Government Code section 12962(a)-(b) instructs the department to serve verified complaints filed for investigation with the department by complainants who are not represented by counsel. Government Code section 12962(c) provides that service must be made at the time of initial contact with the respondent, or within sixty (60) days of filing, whichever occurs first.

This regulation clarifies section 12962 of the Government Code by articulating that the department may, but is not required, to also serve complaints filed for investigation by complainants who are represented by counsel, and complaints accepted for filing purposes only. This regulation further interprets section 12962 by expressly stating that the department does not serve complaints issued in response to requests for an immediate right-to-sue, regardless whether or not a complainant is represented by counsel. Further, this regulation implements, clarifies and makes specific section 12962 of the Government Code by articulating the department's procedure for initiating and effecting service.

Government Code section 12962 is clear only about the department's role in serving complaints filed for investigation by unrepresented complainants. This regulation is necessary because it both informs the public and formalizes the department's procedure for serving a complaint of employment discrimination under section 12962 of the Government Code when it is filed by a represented complainant; when a complaint is taken for filing purposes only, and when a complaint is filed to request an immediate right-to-sue. Limiting its service of process responsibility to complaints filed for investigation by unrepresented complainants ensures that respondents receive proper notice of complaints filed against them, while reducing department costs and allowing staff to focus resources where they are needed most.

Section 10022. Amending Complaints

Government Code section 12930(f)(1) gives the department the power to receive and investigate complaints alleging practices made unlawful by the FEHA, while section 12960(b) gives to any person claiming to be aggrieved by

an alleged unlawful employment practice the right to file a complaint of discrimination with the DFEH.

This regulation implements, interprets and makes specific sections 12930(f)(1) and 12960(b) of the Government Code in their application to complaint amendments. Specifically, this regulation articulates the circumstances and manners in which the department may amend a complaint of employment discrimination that has already been filed with the department.

This regulation is necessary because it both informs the public and formalizes the department's procedure for determining whether to amend a complaint of employment discrimination that has already been filed with the department. The department frequently receives requests to amend complaints; however, the FEHA is silent on the circumstances and procedures governing amendments. The department has determined that the procedures identified in this regulation afford complainants the broadest protections while ensuring that, for open complaints, a respondent has sufficient notice and opportunity to respond to new allegations.

Section 10023. Response to Complaint

Section 12960(b) of the Government Code authorizes any person claiming to be aggrieved by an alleged unlawful employment practice to file a verified complaint of discrimination with the department. Government Code section 12930(f) empowers the department to investigate discrimination complaints; section 12963 directs the department "to make prompt investigation in connection therewith."

This regulation implements, interprets and makes specific section 12963 of the Government Code by articulating that, unless granted an extension by the department, or another exception identified in the regulation applies, a written response to a complaint filed for investigation with the department must be provided to the department within thirty (30) days of service of the complaint.

This regulation is necessary because it both informs the public and formalizes the department's procedure requiring a respondent to submit a written response to a complaint of employment discrimination within 30 days of service of the complaint, unless the complaint is referred to the department's mediation division. The statute is silent about an employer's obligation to submit a response and about the temporary suspension of this requirement when a complaint is referred to mediation. Requiring a respondent to submit a response protects the respondent's rights and helps ensure that the department conducts a thorough and impartial investigation. Temporarily suspending this requirement while parties

mediate helps facilitate collaborative and cost-effective early resolution of complaints.

Section 10024. Conciliation

Government Code sections 12930(f) and 12963.7 authorize the department to conciliate complaints alleging unlawful employment practices or a violation of the Unruh Civil Rights Act, Ralph Civil Rights Act or Disabled Persons Act. Specifically, Government Code section 12963.7(a) provides that “if the department determines after investigation that a complaint is valid, the department shall immediately endeavor to eliminate the unlawful ... practice complained of by conference, conciliation, and persuasion.” The section further provides that “department staff shall not disclose what has transpired in the course of any endeavors to eliminate the unlawful ...practice through conference, conciliation, and persuasion.”

This regulation implements, interprets and makes specific section 12963.7 of the Government Code by articulating the forms the department’s conciliation efforts may take, including, without limitation, pre-determination settlement negotiations and post-investigation conciliation and/or settlement conferences. The regulation further specifies that although settlement negotiations are confidential, any settlement agreement signed by the department, as well as the terms of settlement, are not confidential. The regulation further articulates the department’s obligation to provide both complainants and respondents the opportunity to participate in a conciliation conference on equal terms if the department determines after investigation that a complaint has merit.

This regulation is necessary because it both informs the public and formalizes the department’s conciliation procedures applicable to complaints of employment discrimination. The regulation provides that, notwithstanding the conciliation privilege provided for by Government Code section 12963.7, consistent with the California Public Records Act, a conciliation agreement signed by a department representative is a public record, which cannot be held confidential. This regulation will help ensure that parties are aware of their right to confidential conciliation communications and the department’s obligations pertaining to conciliation agreements, which are a public record.

Section 10025. DFEH Mediation Division Services

The purpose of this regulation is to implement, clarify and make specific sections 12930(f) and 12963.7 of the Government Code by articulating the procedures of the department’s mediation division applicable to complaints of employment discrimination, as determined by the point in the investigative process at which mediation occurs.

This regulation is necessary because it both informs the public and formalizes the department's mediation procedures applicable to complaints of employment discrimination, which depend upon whether a complaint is mediated pre-investigation or post-investigation and, if mediated post-investigation, whether the department has issued an accusation. The regulation provides that, for complaints mediated pre-investigation, a DFEH representative neither participates in the mediation conference nor signs the mediated settlement agreement, if any. This procedure is necessary because, pre-investigation, the department has not yet determined whether a respondent has violated the FEHA. Further, because the department is not a signatory, the settlement agreement is not a public document and can remain confidential, which is necessary to facilitate early resolution of complaints.

Conversely, the regulation provides that, when a complaint is mediated post-accusation, a member of the department's legal division will participate in the mediation conference and sign the settlement agreement, if any. This procedure is necessary because, prior to the issuance of an accusation, the department has determined that sufficient evidence exists to prove that the respondent violated the FEHA. When issuing an accusation, the department does so on behalf of the people of the State of California, as well as to vindicate the complainant's rights. As such, it is necessary for the department to participate as a party to the resolution and necessary, too, that the settlement agreement, if any, be maintained by the department as a public record subject to disclosure.

The regulation further provides that, when a complaint is mediated after investigation but before the department issues an accusation, a representative of the department's enforcement division must participate in the mediation conference, but will not sign the settlement agreement, which will allow the agreement, if any, to remain confidential. The department has determined that this procedure is necessary to facilitate informed negotiations and to facilitate complaint resolution prior to the initiation of litigation.

This regulation will help ensure that parties are aware of their rights and responsibilities and the department's obligations pertaining to DFEH mediations.

Section 10026 (formerly section 10025). Complaint Investigation

Government Code section 12930(f) empowers the department to investigate discrimination complaints; section 12963 directs the department to initiate investigation of employment discrimination complaints promptly. Pursuant to sections 12930(g) and 12963.1–12963.5 of the Government Code, in connection with any matter under investigation by the department, the

department has the authority to issue subpoenas, take depositions, issue written interrogatories, and request production and inspection of documents and material things.

This regulation implements, clarifies and makes specific sections 12930(f)-(g), 12963, 12963.1-12962.5 of the Government Code by articulating that: (1) where it is disputed or unclear that the department has jurisdiction over a particular respondent or allegation, the investigation will initially focus on obtaining the information and documents necessary to determine whether the department has jurisdiction; (2) during the course of its investigation the department may, but is not required, to issue and serve investigative subpoenas, written interrogatories, and requests for production of books, records and documents; (3) the department shall gather during the course of an investigation all critical evidence necessary to determine whether an unlawful practice has occurred; and (4) the department will prioritize early in the investigative process complex cases and cases that appear to have merit to better allocate resources.

This regulation is necessary because it both formalizes the department's procedure for investigating workplace discrimination complaints and articulates points about DFEH investigations about which the public generally is unaware. For example, the regulation provides that the department may, but is not required, to serve written interrogatories or requests for production of documents upon a respondent. Often it is unnecessary to serve formal discovery because a respondent fully participates in the investigation by providing a complete written response, with supporting documents, and makes its employees available for interview in response to an informal request. Notwithstanding the foregoing, it is not unusual for a complainant whose case was closed for insufficient evidence of a FEHA violation to complain that the department failed to fully investigate because it did not engage the respondent in formal discovery, which the respondent's cooperation made unnecessary.

The regulation further provides that, for all workplace discrimination complaints, the department must obtain the complainant's complete personnel file from the respondent. The department has determined that obtaining a complainant's complete personnel file is necessary in every workplace discrimination investigation because, regardless of the nature of the complaint, the complaining employee's personnel file is directly relevant.

Section 10027 (formerly Section 10026). Investigative Subpoenas

Pursuant to sections 12930(g) and 12963.1 of the Government Code, in connection with any matter under investigation by the department, the department has the authority to issue subpoenas to require the attendance and testimony of a witness "by deposition or *otherwise*." [Emphasis added.]

This regulation implements, clarifies and makes specific sections 12930(g) and 12963.1 of the Government Code by articulating that the department's authority to issue subpoenas includes the authority to issue investigative subpoenas for interviews. The regulation further implements, interprets and makes specific sections 12930(g) and 12963.1 of the Government Code by specifying the department's procedure for issuing investigative subpoenas for interviews and conducting interviews pursuant to a subpoena.

This regulation is necessary because it both informs the public and formalizes the department's procedure for issuing investigative subpoenas for interviews in employment discrimination cases. Although the FEHA specifically addresses subpoenas, it does not address the primary purpose for which the department issues and serves subpoenas, i.e., to conduct witness interviews during an investigation. An investigative subpoena is necessary when a respondent refuses to comply with the department's informal request for employee interviews during complaint investigation. This regulation solves this problem both by providing for investigative subpoenas and specifying the department's procedures that apply to them, such as service and respondents' compliance. This regulation will help ensure that parties are aware of their rights and responsibilities—as well as the department's authority—pertaining to investigative subpoenas.

Section 10028 (formerly Section 10027).

**Investigative Requests for
Production and Inspection**

Pursuant to sections 12930(g) and 12963.4 of the Government Code, in connection with any matter under investigation by the department, the department has the authority to request the production for inspection and copying of books, records, documents, and "*physical materials*" in the possession or under the control of an individual or organization. [Emphasis added.]

This regulation implements, interprets and makes specific sections 12930(g) and 12963.4 of the Government Code by articulating that the "physical materials" the department has authority to inspect in connection with an investigation include land or other commercial or real property such as worksites or housing accommodations. The regulation also specifies that the department's inspection authority extends to electronically stored information in the possession or under the control of an individual or organization. This regulation further implements, clarifies and makes specific sections 12930(g) and 12963.4 of the Government Code by specifying the department's procedure for requesting production and inspection and the deadline for a respondent's compliance.

This regulation is necessary because it both informs the public and formalizes the department's procedure for conducting inspections in connection with an investigation, including inspecting electronically stored

information and land or other commercial or real property such as worksites. Although the FEHA specifically addresses requests for production for inspection of books, records, documents, etc., it does not address an important purpose for which the department must often issue and serve a request for production for inspection, i.e., to enter a workplace and inspect a worksite at issue in a complaint under investigation by the department. An investigative request for production and inspection is necessary when a respondent refuses to comply with the department's informal request to conduct an onsite investigation. This regulation provides for that procedure, and will help ensure that parties are aware of their rights and responsibilities—as well as the department's authority—pertaining to workplace inspections.

Section 10029 (formerly Section 10028).

Priority Case Processing/Case Grading System

Government Code section 12930(f)(1) empowers the department to receive, investigate, and conciliate complaints of unlawful practices in employment; section 12963 directs the department to initiate investigation of employment discrimination complaints promptly.

This regulation implements, interprets and makes specific sections 12930(f)(1) and 12963 of the Government Code by articulating the department's implementation of a case grading system to prioritize investigations, better allocate resources, and facilitate collaboration between the department's enforcement and legal divisions early in the investigative process. The regulation further implements, clarifies and makes specific sections 12930(f)(1) and 12963 of the Government Code by identifying a non-exhaustive list of factors the department may consider when prioritizing complaint investigations. The regulation further articulates that initial designations or case grades shall continually be re-evaluated by the department throughout the investigative process, and that at no time will the department disclose to any person outside the department the case grade or designation assigned to any complaint.

This regulation is necessary because it both informs the public and formalizes the department's procedure for implementing a case grading system to prioritize employment investigations. The department has discretion to determine the circumstances under which a particular complaint may be given priority over others for investigation. For example, the department has determined that it is necessary to prioritize the investigation of the allegations of a terminally ill complainant, who might not otherwise survive until the department makes a determination on the merits and seeks a resolution on the complainant's behalf. This regulation will help ensure that the public is aware of these circumstances, which are not articulated in the FEHA.

The department also has determined that it is necessary to prioritize complaint investigations to better allocate the department's resources and achieve greater impact through prosecutions. This regulation provides the necessary mechanism for the department to determine case priority or a case "grade," while ensuring that all complaints filed for investigation with the department are investigated.

Section 10030 (formerly Section 10029).

**Investigations Not Completed
Within Statutory Time Limit**

Government Code section 12965(a) provides that "for any complaint treated by the director as a group or class complaint ..., an accusation shall be issued, if at all, within two years" after the complaint was filed with the department. For any complaint alleging a violation of Section 51.7 of the Civil Code, section 12965(a) requires that if an accusation will be issued, the department must do so within two years after the complaint was filed. "For all other complaints, an accusation shall be issued, if at all, within one year after the filing of a complaint."

This regulation implements, interprets and makes specific section 12965(a) of the Government Code by articulating the department's procedure for continued investigation in the limited instances where it has not been able to complete an investigation within its statutory time limit. This regulation further specifies that although the department may not issue an accusation when an investigation is completed after the statutory time limit, and a complaint has been found meritorious, the department may, in its discretion, issue a director's complaint.

This regulation is necessary because it both informs the public and formalizes the department's procedure for continued investigation of an employment discrimination complaint in the very limited instances where the department has not been able to complete an investigation within the statutory time limit, a circumstance about which the statute is silent. This regulation is necessary because it provides the mechanism by which an aggrieved complainant may achieve redress, even if the department has lost jurisdiction to issue an accusation. This regulation will help ensure that parties are aware of their rights and responsibilities, as well the department's authority to seek resolution of a meritorious complaint when a workplace investigation has gone beyond one year.

Section 10030. Receipt of Confidential Information

This section was originally noticed to the public, but was deleted prior to the first 15-day public comment period for clarity purposes.

Section 10031. Accusation

Government Code section 12930(h) empowers the department to issue accusations and to prosecute those accusations before the Fair Employment and Housing Commission. Pursuant to Government Code section 12965(a), “[i]n the case of failure to eliminate an unlawful [employment] practice ...through conference, conciliation, or persuasion, ...the director in his or her discretion may cause to be issued in the name of the department a written accusation.”

This regulation implements, interprets and makes specific section 12965(a) of the Government Code by articulating a non-exhaustive list of factors the department may consider when determining whether the issuance of an accusation is warranted.

The department has discretion to determine whether or not to issue an accusation alleging employment discrimination when a case has merit. This regulation is necessary because it both informs the public of this discretion and formalizes the department’s procedure for determining not to issue an accusation when circumstances warrant. The department has determined, for example, that issuing an accusation when evidence of a violation is weak, or the likelihood of prevailing at hearing or trial is low, may negatively impact future litigation and is an unwarranted drain on the department’s resources. This regulation will help ensure that the public is aware of these considerations, which are not articulated in the FEHA, and will allow the department to direct its resources where they are most needed.

Section 10032. Notice of Case Closure

Government Code section 12965(b) provides that if the DFEH does not issue an accusation “within one-hundred-fifty (150) days after the filing of a complaint, or if the department earlier determines that no accusation will issue,” the department must notify the party aggrieved by an unlawful employment practice that it will issue a right-to-sue notice to the complainant upon his or her request. The statute further provides that if the complainant does not request a right-to-sue notice, the department is required to issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint. Pursuant to Government Code section 12971, “[i]f... after a complaint has been served on a respondent, the complaint is withdrawn by the complainant or dismissed by the department, or an investigation is terminated or closed by the department, notice of this fact shall be given to the respondent and the complainant without undue delay.”

This regulation implements, interprets and makes specific sections 12965(a) and 12971 of the Government Code by articulating that, for complaints alleging unlawful employment practices forbidden by the FEHA for which a right-to-sue notice has not already been issued, a notice of case closure also

constitutes a right-to-sue notice. The regulation further articulates that the department will provide any complainant whose case it closes a list of resources for locating private counsel or filing a civil complaint in small claims court. The regulation further specifies that when closing a complaint dual-filed with the EEOC, the department must satisfy all reporting requirements arising from its work-sharing agreement with the EEOC.

This regulation is necessary because it informs the public that for complaints alleging unlawful employment practices forbidden by the FEHA for which a right-to-sue has not already been issued, a notice of case closure also constitutes a right-to-sue notice. This fact is not apparent from the statute. This regulation further is necessary because it informs the public and formalizes the department's procedure for providing to any complainant whose case the department closes a list of resources for "self help." (I.e., resources to file a civil complaint in small claims court or locate private counsel.) In sum, the regulation is necessary to ensure that complainants whose complaint the department closes are advised of their remaining avenues of redress, notwithstanding the department's determination.

Section 10033. Departmental Appeal

Government Code section 12960(b) authorizes any individual who has been aggrieved by an unlawful employment practice to file a complaint of discrimination with the department. Similarly, sections 52(f) and 54.3(b) of the Civil Code authorize any person aggrieved by a violation of the Unruh or Ralph Civil Rights Acts or Disabled Persons Act to file a complaint of discrimination with the department. Pursuant to Government Code section 12971, whenever the department closes a complaint after it has been served on a respondent, it must give prompt notice of this fact to both the complainant and respondent.

This regulation implements, interprets, and makes specific section 12971 of the Government Code by articulating the process by which an aggrieved party may request that the department reconsider its rejection of the aggrieved party's complaint or closure of his or her case.

This regulation is necessary because it both provides guidance to the public and formalizes the procedure by which an aggrieved party may request that the department reconsider its case closure or rejection of the aggrieved party's complaint. The FEHA is silent on a party's request for appeal or reconsideration, although it is a matter that arises with some frequency for complainants. A step-by-step procedure for appealing complaint rejections and case closures is necessary to ensure that a complainant has been afforded every opportunity to have his or her complaint fully and fairly investigated by the department. It also is necessary to provide the complainant and the department closure. This

regulation will help ensure that parties are aware of their rights and responsibilities—and the department’s obligations—with respect to internal appeals.

Section 10034. EEOC Substantial Weight Review

This regulation further interprets, clarifies and makes specific section 12971 of the Government Code by articulating the right of a party aggrieved by the department’s closure of a complaint dual-filed with the EEOC to request, within fifteen (15) days of the department’s case closure, that the EEOC conduct a substantial weight review in accordance with its own procedures.

This regulation is necessary because it informs the public of a complainant’s right to request that the EEOC conduct a substantial weight review when the department closes a case for lack of merit, a right that is not articulated in the FEHA. This regulation is necessary to ensure that complainants whose complaints the department closes are aware of this right, and the deadline by which to invoke it.

Subchapter 2. Housing Discrimination Complaints

Section 10035. Filing a Complaint of Housing Discrimination with the Department

Government Code section 12980(a) authorizes any person claiming to be aggrieved by an alleged unlawful housing practice to file a verified complaint of discrimination with the department stating “the name and address of the person alleged to have committed the violation complained of,...set forth the *particulars of the alleged violation and contain any other information required by the [D]epartment.*” [Emphasis added.] Government Code section 12980(b) provides the statute of limitations for filing a complaint of housing discrimination with the department.

This regulation clarifies and makes specific the “particulars” mentioned in Government Code section 12980(a) that must be included in a complaint of housing discrimination filed with the department. The regulation also specifies the “other information” the department requires a complainant of housing discrimination include. The proposed regulation also: (1) expressly incorporates the statute of limitations set forth in Government Code section 12980(b); (2) alerts the reader that sections 10037 and 10052 of the department’s proposed regulations allow for extension of the limitations period; and (3) sets forth the procedure for determining the date a complaint has been filed with the department (“filing date”).

This regulation is necessary because it provides the “particulars” and “other information” mentioned in Government Code section 12980(b), which must be included in a complaint of housing discrimination filed with the department. The required information—not specified elsewhere in the FEHA—is necessary to streamline the administrative process and preserve complainants’ claims.

Section 10036. Liberal Construction

Government Code section 12920 declares that the practice of discrimination in housing on account of any basis or characteristic listed in the FEHA is against the public policy of this state. Government Code section 12921 declares that “[t]he opportunity to seek, obtain, and hold housing without discrimination” on account of any basis protected by the FEHA or section 51 of the Civil Code is a civil right. Government Code section 12930(f)(1)-(2) gives the department the power to receive, investigate, and conciliate complaints alleging practices made unlawful by the FEHA or Civil Code section 51, while section 12980(a) gives to any person claiming to be aggrieved by an alleged unlawful housing practice the right to file a complaint of discrimination with the DFEH. Section 12993(a) of the Government Code provides that the provisions of the FEHA prohibiting discrimination shall be “construed liberally for the accomplishment of the purposes” of the FEHA.

This regulation implements, interprets, and makes specific sections 12920, 12921(b), 12980(a) and 12993(a) of the Government Code in their application to construction of complaints of housing discrimination filed with the department. **It is necessary to inform the public, protect the rights of complainants- especially those who are unrepresented and/or able to clearly articulate their claims-and formalize the department’s procedure of liberally construing housing discrimination complaints to effectuate the purposes of the FEHA. Section 12980 itself is silent on the broad manner in which the department must construe complaints.**

Section 10037. Filing a Housing Discrimination Complaint with the Department Alleging a Violation of the Unruh Civil Rights Act, Ralph Civil Rights Act, or Disabled Persons Act

Government Code section 12930(f)(2) gives the department the power to receive, investigate, and conciliate complaints alleging a violation of the Unruh Civil Rights Act (Civ. Code, § 51), the Ralph Civil Rights Act (Civ. Code, § 51.7), and the Disabled Persons Act (Civ. Code, § 54 et seq.). Civil Code sections 52(f) and 54.3(b) provide an individual aggrieved by an alleged violation of Civil Code sections 51, 51.7 or 54 et seq. the right to file a complaint of discrimination with the department.

This regulation implements, interprets, and makes specific Government Code section 12930(f)(2) by articulating the procedures of the department that apply to Unruh or Ralph Civil Rights Acts and Disabled Persons Act housing discrimination complaints, depending upon whether the complaint also states allegations over which HUD has concurrent jurisdiction.

This regulation is necessary because it informs the public and formalizes the procedures of the department that apply to Civil Code sections 51, 51.7 and 54 complaints that allege housing discrimination, depending upon whether the complaint also states allegations over which HUD has concurrent jurisdiction. Is it unclear from the statute which department procedures apply to these complaints when they do not contain allegations over which HUD has concurrent jurisdiction. This regulation, specifying that the department's procedures for processing employment discrimination complaints apply when HUD lacks concurrent jurisdiction, solves this problem.

Section 10038. Intake

Government Code section 12930(f)(1)-(f)(2) gives the department the function and power to receive complaints alleging housing practices made unlawful by the FEHA, Unruh Civil Rights Act, Ralph Civil Rights Act or Disabled Persons Act. Sections 52(f) and 54.3(b) of the Civil Code and section 12980(a) of the Government Code give to any victim of housing discrimination the right to file a complaint of discrimination with the DFEH. Government Code section 12980(a) articulates some of the particulars a complainant must include in a complaint of housing discrimination filed with the department. Government Code section 12980(b) provides the statute of limitations.

This regulation implements sections 12930 and 12980(a) of the Government Code by articulating: (1) the department's intake procedure for complainants alleging housing discrimination; (2) the process for making an intake appointment with the department as a precursor to filing with the department a complaint alleging housing discrimination; and (3) the information a complainant must provide the department prior to intake so the department may determine whether it has jurisdiction over the complainant's allegations.

This regulation is necessary because it both informs the public and formalizes the department's intake procedures for housing discrimination complaints. Intake procedures, which are necessary to determine whether a complaint can be accepted for investigation, are not articulated in the FEHA. The regulation provides for telephonic intake interviews. Conducting housing intake via telephone has enabled the department for years to serve complainants statewide from two offices while keeping overhead costs at a minimum. The information the department requires complainants to provide in advance of their intake appointments

streamlines the process and makes it even more efficient for the public and the department.

Section 10039. Priority Intake

This regulation further implements sections 12930 and 12980(a) of the Government Code by articulating the circumstances under which the department may give a particular complainant priority over other complainants for the purpose of scheduling an intake appointment.

This regulation is necessary because it informs the public and formalizes the department's procedure for prioritizing intake appointments for complainants alleging housing discrimination. The department has discretion to determine the circumstances under which a particular complainant may be given priority over others for an intake interview. This regulation will help ensure that the public is aware of these circumstances, which are not articulated in the FEHA, and that complainants in priority circumstances—such as those whose statute of limitations will run in 30 days are less—are given priority so that their right to file is not lost.

Section 10040. Testing

Fair housing testers call or visit housing accommodations to inquire about vacancies. Although they pretend to be genuinely interested in renting or buying a home or apartment, their true purpose is to determine whether a property owner or manager is complying with fair housing laws. Evidence of fair housing testing is routinely admitted in cases filed under the federal Fair Housing Act and other anti-discrimination statutes. (*Inland Mediation Bd. v. City of Pomona* (2001) 158 F.Supp.2d 1120; *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363 [102 S.Ct. 1114, 71 L.Ed.2d 214].) However, section 12985 of the Government Code provides that whenever a member of the department's staff contacts a person against whom a complaint of housing discrimination has been filed, the person shall be informed whether the contact is for the purpose of investigation or conference, conciliation, or persuasion. The effect of Government Code section 12985 is to prohibit the department from contacting a respondent to conduct fair housing testing after a complaint of discrimination has been filed with the department against the respondent.

This regulation implements, interprets and clarifies section 12985 of the Government Code by articulating that department staff may conduct a telephone test during the intake of a housing discrimination complaint, before a complaint is filed, to test for discriminatory selection practices, without identifying themselves or the purpose of their inquiry. The regulation further specifies that if testing is desired by the department after a complaint is filed, a test may be conducted by a fair housing agency. **This regulation is necessary because it informs the public and establishes the procedure by which the department may**

conduct testing to determine whether a person is engaging in unlawful housing practices. This regulation will help ensure that the public is aware of the department's authority to conduct testing, which is not apparent from the statute.

Section 10041. Drafting Housing Discrimination Complaints

Government Code section 12930(f)(1)-(2) gives the department the function and power to receive and investigate complaints alleging housing practices made unlawful by the FEHA, Unruh Civil Rights Act, Ralph Civil Rights Act and Disabled Persons Act. Civil Code sections 52(f) and 54.3(b) as well as Government Code section 12980(a) authorize any person claiming to be aggrieved by an alleged unlawful housing practice to file a verified complaint of discrimination with the department. Government Code section 12980(a) also articulates some of the particulars that must be included in the complaint.

This regulation implements, interprets, and makes specific Government Code sections 12930 and 12980(a) by articulating that: (1) it is the department that shall draft the language of each housing discrimination complaint filed with it; (2) the complaint shall be taken on a complaint form prescribed by the department; (3) the complaint shall contain all the information identified in section 12980(a) of the Government Code and sections 10035 and 10038 of the department's regulations; (4) the complaint shall set forth the allegations in ordinary and concise language of the department's choosing; and (5) the department shall liberally construe the facts alleged by a complainant when drafting a complaint and include all relevant claims supported by the facts alleged.

This regulation provides the procedure by which the department prepares housing discrimination complaints. A specific procedure is necessary for conformity, to streamline the complaint process, and ensure timely complaint filing. This regulation both informs the public and formalizes the department's procedure for drafting housing discrimination complaints, a matter about which the FEHA is silent.

Section 10042. Written Statement or Correspondence as Complaint

This regulation further implements, interprets, and makes specific Government Code sections 12930(f) and 12980(a) by articulating the limited circumstances that may lead the department to initially accept a written statement or correspondence from a complainant, in lieu of a complaint on a form prescribed by the department, for filing.

This regulation, too, is necessary because it informs the public and formalizes the department's procedure by articulating the limited circumstances that may lead to the acceptance of a written statement or

correspondence from a complainant for initial filing, in lieu of a complaint prepared in accordance with section 10041. This regulation would be of particular importance to plaintiffs' attorneys and advocates who, because of their clients' special needs or circumstances, may seek to file a written statement or correspondence on behalf of a client who is unable to do so himself or herself, to preserve the client's rights.

Section 10043. Multiple Complainants

This regulation further implements, interprets, and makes specific Government Code sections 12930(f) and 12980(a) by articulating the department's procedure for taking complaint(s) when more than one complainant has been aggrieved by the same unlawful housing practice.

This regulation is necessary because it provides the department's procedure for taking a housing discrimination complaint when more than one complainant has been aggrieved by the same unlawful housing practice, including minor children. Unlike an employment discrimination complaint, which typically is filed by an individual complainant based on conduct directed at him or her alone, a discriminatory housing practice typically affects all members of a household at once. This regulation both informs the public and formalizes the department's procedure for drafting a complaint when more than one member of a household is affected by an unlawful housing practice, a matter about which the FEHA is silent.

Section 10044. HUD-Generated Complaints

This regulation further implements, clarifies, and makes specific Government Code sections 12930(f) and 12980(a) by articulating the department's procedure for filing complaints of housing discrimination that were initially filed with, and referred to the department for investigation by, HUD.

This regulation is necessary because it both informs the public and formalizes the department's procedure for intake and filing complaints of housing discrimination that were initially filed with, and referred to the department for investigation by, HUD. The FEHA is silent on the procedural relationship between the DFEH and HUD when complaints are dual-filed. The department's receipt of complaints for investigation under state law, even when HUD has concurrent jurisdiction, ensures that complainants are afforded the broadest protections applicable under law and helps maintain the department's federal funding. Conversely, foregoing an intake interview when one has been conducted by HUD preserves the department's resources and prevents unnecessary duplication of efforts.

Section 10045. Department-Generated Complaints

This regulation further implements, clarifies, and makes specific Government Code sections 12930(f) and 12980(a) by articulating the department's procedure for referring to HUD for dual-filing all housing discrimination complaints originally filed with the department over which HUD has concurrent jurisdiction. The regulation further specifies that, unless otherwise directed by HUD, the responsibility for investigating complaints initially filed with the department that HUD accepts for dual-filing remains with the department.

This regulation is necessary because it articulates the department's procedure for referring to HUD for dual-filing all housing discrimination complaints originally filed with the department over which HUD has concurrent jurisdiction. Dual filing affords complainants the broadest protections applicable under law; however, the FEHA is silent on each organization's respective responsibility when a housing complaint is dual filed.

Section 10046. Director's Complaints

Government Code section 12980(a) authorizes any person claiming to be aggrieved by an alleged unlawful housing practice to file a verified complaint of housing discrimination with the department. Government Code section 12980(c) instructs the department to "proceed upon [a housing discrimination] complaint in the same manner and with the same powers," commencing with Government Code section 12960, applicable to employment discrimination complaints. Government Code section 12960 authorizes the director of the DFEH to file a verified complaint of discrimination. Pursuant to Government Code section 12961, where an alleged unlawful practice adversely affects in a similar manner, or raises questions of law or fact that are common to a group or class of persons of which the aggrieved person is a member, the director may file the complaint on behalf and as representative of such a group or class.

This regulation implements, interprets, and makes specific Government Code sections 12960-12961 and 12980(a) & (c) by articulating the department's procedure governing a director's complaint alleging housing discrimination, including a non-exhaustive list of factors the department may consider when determining whether to file a director's complaint.

This regulation is necessary because it both informs the public and formalizes the department's procedure for issuance of a director's complaint alleging housing discrimination, including a non-exhaustive list of factors the department has determined warrant the filing of a director's complaint. Section 12960(b) authorizes the filing of a director's complaint, but is silent regarding applicability and procedure.

Section 10047. Class or Group Complaints

Government Code section 12980(a) authorizes any person claiming to be aggrieved by an alleged unlawful housing practice to file a verified complaint of housing discrimination with the department. Government Code section 12980(c) instructs the department to “proceed upon [a housing discrimination] complaint in the same manner and with the same powers,” applicable to employment discrimination complaints. Pursuant to Government Code section 12961, where an alleged unlawful employment practice adversely affects in a similar manner, or raises questions of law or fact common to a group or class of applicants or employees of which the aggrieved person is a member, the aggrieved person or the director may file a complaint on behalf and as representative of such a group or class. Government Code section 12965(a), pertaining to accusations, provides that “for any complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, and accusation pursuant to Section 12961, an accusation shall be issued, if at all, within two years after the filing of the complaint.”

This regulation implements, interprets, and makes specific Government Code sections 12961, 12965(a) and 12980(a) & (c) by articulating the department’s procedure governing class complaints alleging housing discrimination, including a non-exhaustive list of factors the department may consider when determining whether to file a class complaint.

This regulation is necessary because it both informs the public and formalizes the department’s procedure for class or group complaints alleging housing discrimination, including a non-exhaustive list of factors the department has determined warrants the filing of a class or group complaint. Section 12961 authorizes the filing of a class or group complaint by the department, but gives only general guidance regarding applicability and procedure.

Section 10048. Retaliation Complaints – Special Considerations

Government Code section 12930(f)(1) gives the department the function and power to receive and investigate complaints alleging housing practices made unlawful by the FEHA. Government Code section 12980(a) authorizes any person claiming to be aggrieved by an alleged unlawful housing practice to file a verified complaint of discrimination with the department. Under Government Code section 12955.7, it is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of his or her right to housing free from discrimination, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of the right to discrimination free housing.

This regulation implements, interprets, and makes specific sections 12930(f) and 12980(a) & (c) of the Government Code, in their application to

allegations of retaliation in housing, by articulating the department's filing procedure for retaliation complaints.

The proposed regulation is necessary because it both informs the public and formalizes the department's filing procedures applicable to complaints alleging retaliatory housing practices. The statute is silent on filing procedures specific to retaliation allegations, which, depending upon the facts and circumstances, may be included with other allegations in an initial complaint, filed separately in a subsequent complaint, or included via amendment to an initial complaint when the statute of limitations has run. The department has determined that the procedures set forth in this regulation afford complainants the greatest protection of their right to file a retaliation complaint for investigation.

Section 10049. First Amendment Policy

This regulation further implements, clarifies, and makes specific sections 12930(f) and 12980(a) & (c) of the Government Code, by articulating the department's procedure for identifying—and its procedure for receiving, investigating and conciliating—housing discrimination complaints that implicate First Amendment rights.

This regulation is necessary because it informs the public, and balances respondents' free speech rights against the department's duty to investigate complaints of discrimination by articulating the department's procedures applicable to housing discrimination complaints that implicate First Amendment rights. Procedures specific to complaints implicating First Amendment rights are not articulated in the statute. This regulation corrects that omission. This regulation further is necessary pursuant to a settlement agreement the department entered into in *Waltz v. Brumfield*, Case No. 5:08-cv-00432-JTM-OP (C.D.Cal., June 2010), wherein it was alleged that the department's investigation of a housing complaint alleging harassment on the basis of disability infringed upon the respondent's First Amendment rights.

Section 10050. Medical Information – Special Considerations

Government Code section 12930(f)(1) gives the department the function and power to receive and investigate complaints alleging housing practices made unlawful by the FEHA, while section 12980(a) authorizes any person claiming to be aggrieved by an alleged unlawful housing practice to file a verified complaint of discrimination with the department. Under Government Code section 12955, it is an unlawful housing practice to discriminate against any person because of his or her disability. Pursuant to Government Code section 12927(c)(1), discrimination includes refusal to make reasonable accommodations in rules,

policies, practices, or services when to do so is necessary to afford a person with a disability equal opportunity to use and enjoy a housing accommodation.

This regulation implements, interprets, and makes specific sections 12930(f) and 12980(a) of the Government Code, in their application to disability discrimination or denial of reasonable accommodation complaints, by articulating that complainants alleging physical or mental disability discrimination in housing must authorize the department in writing to request and obtain copies of all directly relevant medical information or records necessary to evaluate and prosecute a disability discrimination or denial of reasonable accommodation claim, which the department will maintain confidential during the investigation.

This regulation is necessary because it both informs the public and formalizes the department's procedure for obtaining and safeguarding a complainant's medical information when medical information is necessary to investigate and evaluate a complaint of housing discrimination, a matter about which the FEHA is silent. The department has determined that the procedures set forth in this regulation provide the proper balance between protecting complainants' right to privacy and the department's statutory duty to fully investigate a complaint of discrimination.

Section 10051. Effect of Prior Waiver Agreement/Release of All Claims

Government Code section 12920 declares that the practice of discrimination in housing accommodations is against public policy. Section 12920 also states that it is the purpose of the FEHA "to provide effective remedies that will eliminate these discriminatory practices." Government Code section 12930(f)(1) gives the department the power to receive, investigate, and conciliate complaints alleging practices made unlawful by the FEHA, while section 12980(a) gives to any person claiming to be aggrieved by an alleged unlawful housing practice the right to file a complaint of discrimination with the DFEH.

This regulation implements, interprets and makes specific the application of Government Code section 12920 to sections 12930(f)(1) and 12980(a) by articulating the factors the department considers when determining whether to pursue a complaint when a complainant has executed a prior valid waiver or release of all claims. Such factors include, but are not limited to, whether the complaint alleges an unlawful systemic policy or practice that adversely affects a large number of tenants or applicants.

This regulation is necessary because it both informs the public and formalizes the department's procedure for determining whether to pursue a complaint when a complainant has executed a prior valid waiver or release of all claims. This issue arises occasionally in housing discrimination

investigations and is an issue about which the statute is silent. This regulation will inform the public about the limited applicability of prior waivers to department investigations. Further, this regulation will help ensure the appropriate balance between parties' right to contract for closure and the department's obligation to investigate, notwithstanding a prior valid waiver, on behalf of similarly situated applicants or tenants.

Section 10052. Complaints Taken After Expiration of Statute of Limitation Due to Department Error

Government Code section 12980(a) provides that no housing discrimination complaint may be filed with the department after the expiration of one year from the date on which the unlawful practice occurred or terminated. In *Dept. Fair Empl. & Hous. v. Cairo*, the Fair Employment and Housing Commission held that the one-year statute of limitation for filing a complaint may be tolled when the department misleads a complainant about filing obligations, commits errors in processing a complaint for filing, or improperly discourages or prevents a complainant from filing at all. (*Dept. Fair Empl. & Hous. v. Cairo* (Jan. 6, 1984) No. 84-04, FEHC Precedential Decs.1984-85, CEB 3 [1984 WL 54284 (Cal.F.E.H.C.)].)

This regulation implements and makes specific the application of the commission's holding in *Dept. Fair Empl. & Hous. v. Cairo* to the statute of limitations set forth in Government Code section 12980(a).

This regulation is necessary because it informs the public of a little-known precedential Fair Employment and Housing Commission decision, which the department must follow when applicable, to accept a housing discrimination complaint for filing when the statute of limitations has run due to department error or neglect. Issuance of this regulation will put respondents on notice and help ensure that a party's right to file is not lost due to department error or omission.

Section 10053. Service of Complaints

Government Code section 12986 directs the department to serve a verified complaint of housing discrimination within ten (10) days after it has been filed with the department.

This regulation implements, interprets and makes specific Government Code section 12986 by articulating the department's procedure for initiating and effecting service of housing discrimination complaints.

This regulation is necessary because it informs the public and articulates the steps the department must take to serve a housing discrimination complaint within 10 days and endeavor to keep the service

documents confidential. Government Code section 12986 provides only that the department must “within 10 days cause a copy of the verified complaint ... to be served upon or mailed to the respondent.” Yet, completion of service within ten days is not always possible, particularly when a respondent endeavors to avoid service. This is regulation is necessary because it clarifies that the department must *initiate* service within 10 days and that, if serving by mail, service must be by *certified mail, return receipt requested*. The regulations further is necessary because it provides additional steps the department must take if service by mail is unsuccessful, and the flexibility to attempt personal service first, regardless of cost, if the likelihood of timely completion of service by personal service is greater.

Section 10054. Amending Complaints

Government Code section 12930(f)(1) gives the department the power to receive and investigate complaints alleging practices made unlawful by the FEHA, while section 12980(a) gives to any person claiming to be aggrieved by an alleged unlawful housing practice the right to file a complaint of discrimination with the DFEH.

This regulation implements, interprets and makes specific sections 12930(f)(1) and 12980(a) of the Government Code in their application to complaint amendments. Specifically, this regulation articulates the circumstances and manners in which the department may amend a complaint of housing discrimination that has already been filed with the department.

This regulation is necessary because it both informs the public and formalizes the department’s procedure for determining whether to amend a complaint of housing discrimination that has already been filed with the department. The department frequently receives requests to amend complaints; however, the FEHA is silent on the circumstances and procedures governing amendments. The department has determined that the procedures identified in this regulation afford complainants the broadest protections while ensuring that, for open complaints, a respondent has sufficient notice and opportunity to respond to new allegations.

Section 10055. Response to Complaint

Pursuant to Government Code section 12986, a respondent who has been served with a verified housing discrimination complaint may file a response to the complaint with the department.

This regulations implements, interprets and makes specific Government Code section 12986 by articulating that unless granted an extension by the

department, or **the requirement is temporarily suspended** due to participation in the department's mediation program, a response to a housing discrimination complaint must be provided to the department within twenty (20) days of service of the complaint.

This regulation is necessary because it both informs the public and formalizes the department's procedure requiring a respondent to submit a written response to a DFEH complaint of housing discrimination within 20 days of service of the complaint, unless the complaint is referred to the department's mediation division. The statute mentions only that a respondent "may" submit an answer to the complaint, and is silent about the temporary suspension when a complaint is referred to mediation. Requiring a respondent to submit a response protects the respondent's rights and helps ensure that the department conducts a thorough and impartial investigation. Temporarily suspending this requirement while parties mediate helps facilitate collaborative and cost-effective early resolution of complaints.

Section 10056. Conciliation

Government Code sections 12930(f) and 12984 authorize the department to conciliate complaints alleging unlawful housing practices. Further, Government Code section 12984 provides that "the members of the department and its staff shall not disclose to any person what has transpired in the course of such endeavors to conciliate." Pursuant to section 12980(i) of the Government Code, however, "[a]ll agreements reached in settlement of any housing discrimination complaint ... shall be made public, unless otherwise agreed by the complainant and respondent, and the department determines that the disclosure is not required to further the purposes of the act."

This regulation implements, interprets and makes specific sections 12980(i) and 12984 of the Government Code by articulating the various forms the department's conciliation efforts may take, including, without limitation, pre-determination settlement negotiations and mediation conferences as well as post-investigation conciliation and/or settlement conferences. The regulation further specifies that although settlement negotiations are confidential, any settlement agreement signed by the department, as well as the terms of settlement, are not confidential. The regulation further articulates the department's obligation to provide both complainants and respondents the opportunity to participate in a conciliation conference on equal terms if the department determines after investigation that a complaint has merit.

This regulation is necessary because it both informs the public and formalizes the department's conciliation procedures applicable to complaints of housing discrimination. The regulation provides that, notwithstanding the conciliation privilege provided for by Government

Code section 12984, consistent with the California Public Records Act, a conciliation agreement signed by a department representative is a public record, which cannot be held confidential. This regulation will help ensure that parties are aware of their right to confidential conciliation communications and the department's obligations pertaining to conciliation agreements, which are a public record.

Section 10057. DFEH Mediation Division Services

The purpose of this regulation is to implement, clarify and make specific sections 12930(f), 12980(i) and 12984 of the Government Code by articulating the procedures of the department's mediation division applicable to complaints of housing discrimination, as determined by the point in the investigative process at which mediation occurs.

This regulation is necessary because it both informs the public and formalizes the department's mediation procedures applicable to complaints of housing discrimination, which depend upon whether a complaint is mediated pre-investigation or post-investigation and, if mediated post-investigation, whether the department has issued an accusation. The regulation provides that, for complaints mediated pre-investigation, a DFEH representative neither participates in the mediation conference nor signs the mediated settlement agreement, if any. This procedure is necessary because, pre-investigation, the department has not yet determined whether a respondent has violated the FEHA. Further, because the department is not a signatory, the settlement agreement is not a public document and can remain confidential, which is necessary to facilitate early resolution of complaints.

Conversely, the regulation provides that, when a complaint is mediated post-accusation, a member of the department's legal division will participate in the mediation conference and sign the settlement agreement, if any. This procedure is necessary because, prior to the issuance of an accusation, the department has determined that sufficient evidence exists to prove that the respondent violated the FEHA. When issuing an accusation, the department does so on behalf of the people of the State of California, as well as to vindicate the complainant's rights. As such, it is necessary for the department to participate as a party to the resolution and necessary, too, that the settlement agreement, if any, be maintained by the department as a public record subject to disclosure.

The regulation further provides that, when a complaint is mediated after investigation but before the department issues an accusation, a representative of the department's enforcement division must participate in the mediation conference, but will not sign the settlement agreement, which will allow the agreement, if any, to remain confidential. The

department has determined that this procedure is necessary to facilitate informed negotiations as well as to facilitate complaint resolution prior to the initiation of litigation.

This regulation will help ensure that parties are aware of their rights and responsibilities and the department's obligations pertaining to DFEH mediations.

Section 10058 (formerly Section 10057). Complaint Investigation

Government Code section 12930(f) empowers the department to investigate discrimination complaints. Government Code section 12980(c) instructs the department to "proceed upon [a housing discrimination] complaint in the same manner and with the same powers" applicable to employment discrimination complaints. Section 12963 of the Government Code directs the department to initiate investigation of employment discrimination complaints promptly. Pursuant to sections 12930(g) and 12963.1–12963.5 of the Government Code, in connection with any matter under investigation by the department, the department has the authority to issue subpoenas, take depositions, issue written interrogatories and request production and inspection of documents and physical things.

This regulation implements, interprets and makes specific sections 12930(f)-(g), 12963, 12963.1-12962.5 and 12980(c) of the Government Code by articulating that: (1) where it is disputed or unclear that the department has jurisdiction over a particular respondent or allegation, the investigation will initially focus on obtaining the information and documents necessary to determine whether the department has jurisdiction; (2) during the course of its investigation the department may, but is not required, to issue and serve investigative subpoenas, written interrogatories, and requests for production of books, records and documents; (3) the department shall gather during the course of an investigation all critical evidence necessary to determine whether an unlawful housing practice has occurred; (4) the department will prioritize early in the investigative process complex cases and cases that appear to have merit to better allocate resources.

This regulation is necessary because it both formalizes the department's procedure for investigating housing discrimination complaints and articulates points about DFEH investigations about which the public generally is unaware. For example, the regulation provides that the department may, but is not required, to serve written interrogatories or requests for production of documents upon a respondent. Often it is unnecessary to serve formal discovery because a respondent fully participates in the investigation by providing a complete written response, with supporting documents, and makes witnesses available for interview in response to an informal request. Notwithstanding the foregoing, it is not

unusual for a complainant whose case was closed for insufficient evidence of a FEHA violation to complain that the department failed to fully investigate because it did not engage the respondent in formal discovery, which the respondent's cooperation made unnecessary.

Section 10059 (formerly Section 10058). Investigative Subpoenas

Government Code section 12980(c) instructs the department to “proceed upon [a housing discrimination] complaint in the same manner and with the same powers” applicable to employment discrimination complaints. Pursuant to sections 12930(g) and 12963.1 of the Government Code, in connection with any matter under investigation by the department, the department has the authority to issue subpoenas to require the attendance and testimony of a witness “by deposition or *otherwise*.” [Emphasis added.]

This regulation implements, interprets and makes specific sections 12930(g) and 12963.1, and 12980(c) of the Government Code by articulating that the department's authority to issue subpoenas applies to housing discrimination complaints and includes the authority to issue investigative subpoenas for respondent or witness interviews. The regulation further implements, interprets and makes specific sections 12930(g), 12963.1 and 12980(c) of the Government Code by specifying the department's procedure for issuing investigative subpoenas for interviews and conducting interviews pursuant to a subpoena.

This regulation is necessary because it both informs the public and formalizes the department's procedure for issuing investigative subpoenas for interviews in housing discrimination cases. Although the FEHA specifically addresses subpoenas, it does not address the primary purpose for which the department issues and serves subpoenas, i.e., to conduct witness interviews during an investigation. An investigative subpoena is necessary when a respondent refuses to comply with the department's informal request for witness interviews during complaint investigation. This regulation solves this problem both by providing for investigative subpoenas and specifying the DFEH procedures that apply to them, such as service and respondents' compliance. This regulation will help ensure that parties are aware of their rights and responsibilities—as well as the department's authority—pertaining to investigative subpoenas.

**Section 10060 (formerly Section 10059). Investigative Requests for
Production and Inspection**

Government Code section 12980(c) instructs the department to “proceed upon [a housing discrimination] complaint in the same manner and with the same powers” applicable to employment discrimination complaints. Pursuant to sections 12930(g) and 12963.4 of the Government Code, in connection with any

matter under investigation by the department, the department has the authority to request the production for inspection and copying of books, records, documents, and “*physical materials*” in the possession or under the control of an individual or organization. [Emphasis added.]

This regulation implements, interprets and makes specific sections 12930(g), 12963.4 and 12980(c) of the Government Code by articulating that the “physical materials” the department has authority to inspect in connection with an investigation of unlawful practices include land or other commercial or real property such as worksites or housing accommodations. The regulation also specifies that the department’s authority extends to electronically stored information in the possession or under the control of an individual or organization. This regulation further implements, interprets and makes specific sections 12930(g), 12963.4 and 12980(c) of the Government Code by specifying the department’s procedure for requesting production and inspection and the deadline for a respondent’s compliance.

This regulation is necessary because it both informs the public and formalizes the department’s procedure for conducting inspections in connection with an investigation, including inspecting electronically stored information and land or other commercial or real property such as such as a building management office or housing accommodation. Although the FEHA specifically addresses requests for production for inspection of books, records, documents, etc., it does not address an important purpose for which the department must often issue and serve a request for production for inspection, i.e., to enter and inspect a building management office or housing accommodation at issue in a complaint under investigation by the department. An investigative request for production and inspection is necessary when a respondent refuses to comply with the department’s informal request to conduct an onsite investigation. This regulation provides for that procedure, and will help ensure that parties are aware of their rights and responsibilities—as well as the department’s authority—pertaining to onsite inspections.

Section 10061 (formerly Section 10060).

Priority Case Processing/Case Grading System

Government Code section 12930(f)(1) empowers the department to receive, investigate and conciliate complaints of unlawful practices in employment and housing. Government Code section 12980(c) instructs the department to “proceed upon [a housing discrimination] complaint in the same manner and with the same powers” applicable to employment discrimination complaints. Section 12963 of the Government Code directs the department to initiate investigation of employment discrimination complaints promptly.

This regulation implements, interprets and makes specific sections 12930(f)(1), 12963, and 12980(c) of the Government Code by articulating the department's implementation of a case grading system to prioritize investigations, better allocate resources, and facilitate collaboration between the department's enforcement and legal divisions early in the investigative process. The regulation further implements, interprets and makes specific sections 12930(f)(1) and 12963 of the Government Code by identifying a non-exhaustive list of factors the department may consider when prioritizing complaint investigations. The regulation further articulates that initial designations or case grades shall continually be re-evaluated by the department throughout the investigative process, and that at no time will the department disclose to any person outside the department the case grade or designation assigned to any complaint.

This regulation is necessary because it both informs the public and formalizes the department's procedure for implementing a case grading system to prioritize housing discrimination investigations. The department has discretion to determine the circumstances under which a particular complaint may be given priority over others for investigation. For example, the department has determined that it is necessary to prioritize the investigation of the allegations of a terminally ill complainant, who might not otherwise survive until the department makes a determination on the merits and seeks a resolution on the complainant's behalf. This regulation will help ensure that the public is aware of these circumstances, which are not articulated in the FEHA.

The department also has determined that it is necessary to prioritize complaint investigations to better allocate the department's resources and achieve greater impact through prosecutions. This regulation provides the necessary mechanism for the department to determine case priority or a case "grade," while ensuring that all complaints filed for investigation with the department are investigated.

Section 10062 (formerly Section 10061).

**Investigations Not Completed
Within Statutory Time Limit**

Government Code section 12980(f) provides that the investigation of a complaint of housing discrimination filed with the department must be completed within one-hundred (100) days, "unless it is impractical to do so." Similarly, Government Code section 12981(a) provides that "[a]n accusation alleging an unfair housing practice shall be issued within 100 days after the filing of a complaint *unless it is impracticable to do so.*" [Emphasis added.] Pursuant to Government Code sections 12981(a) and 12965(a), when it is impracticable for the department to complete its investigation of an unfair housing practice and issue an accusation within one-hundred (100) days, the department may have up

to one year for non-class complaints, and up to two years for class complaints, to issue an accusation.

This regulation implements, interprets and makes specific sections 12965(a), 12980(f) and 12981(a) of the Government Code by articulating the department's procedure for continued investigation of housing discrimination complaints in the limited instances where it has not been able to complete an investigation within its statutory time limit. This regulation further specifies that although the department may not issue an accusation when an investigation is completed after the statutory time limit, and a complaint has been found meritorious, the department may, in its discretion, issue a director's complaint.

This regulation is necessary because it both informs the public and formalizes the department's procedure for continued investigation of a housing discrimination complaint in the very limited instances where the department has not been able to complete an investigation within the statutory time limit, a circumstance about which the statute is silent. This regulation is necessary because it provides the mechanism by which an aggrieved complainant may achieve redress, even if the department has lost jurisdiction to issue an accusation. This regulation will help ensure that parties are aware of their rights and responsibilities, as well the department's authority to seek resolution of a meritorious complaint when a housing discrimination investigation has gone beyond one year.

Section 10062. Receipt of Confidential Information

This section was originally noticed to the public, but was deleted prior to the first 15-day public comment period for clarity purposes.

Section 10063. Accusation

Government Code section 12930(h) empowers the department to issue accusations and to prosecute those accusations before the commission. Pursuant to Government Code sections 12965(a) and 12981(a), "[i]n the case of failure to eliminate an unlawful practice ...through conference, conciliation, or persuasion" the director is authorized to issue an accusation in the name of the department.

This regulation implements, interprets and makes specific sections 12965(a) and 12981(a) of the Government Code by articulating a non-exhaustive list of factors the department may consider when determining whether the issuance of an accusation is warranted.

The department has discretion to determine whether or not to issue an accusation alleging housing discrimination when a case has merit. This regulation is necessary because it both informs the public of this discretion

and formalizes the department's procedure for determining not to issue an accusation when circumstances warrant. The department has determined, for example, that issuing an accusation when evidence of a violation is weak, or the likelihood of prevailing at hearing or trial is low, may negatively impact future litigation and is an unwarranted drain on the department's resources. This regulation will help ensure that the public is aware of these considerations, which are not articulated in the FEHA, and allow the department to direct its resources where they are most needed.

Section 10064. Notice of Case Closure

Government Code section 12980(c) instructs the department to "proceed upon [a housing discrimination] complaint in the same manner and with the same powers" applicable to employment discrimination complaints. Pursuant to Government Code section 12971, pertaining to employment discrimination complaints, "[i]f... after a complaint has been served on a respondent, the complaint is withdrawn by the complainant ... or an investigation is closed by the department, notice of this fact shall be given to the respondent and the complainant without undue delay."

This regulation implements, interprets and makes specific sections 12971 and 12980(a) of the Government Code by articulating that whenever a complaint of housing discrimination is withdrawn by the complainant or closed by the department, the department shall promptly notify the complainant and respondent of the case closure, and the reason for closure, in writing. The regulation further articulates that the department will provide any complainant whose case it closes a list of resources for locating private counsel or filing a civil complaint in small claims court. The regulation further specifies that when closing a complaint dual-filed with HUD, the department must satisfy all reporting requirements arising from its work-sharing agreement with the HUD.

This regulation is necessary because it both informs the public and formalizes the department's case closure procedures for housing discrimination complaints. The regulation establishes the department's procedure of providing to any complainant whose case the department closes a list of resources for "self help." (I.e., resources to file a civil complaint in small claims court or locate private counsel.) The regulation is necessary to ensure that complainants whose complaint the department has closed are advised of their remaining avenues of redress, notwithstanding the department's determination, and informed that unless HUD begins to require the issuance of a right-to-sue before an aggrieved party may file suit in court, the department will not issue a complainant a right-to-sue upon the closure of a complaint alleging unlawful housing practices. The proposed regulation also informs the public that when closing a complaint dual-filed with HUD, the department must satisfy all reporting requirements arising from its work-sharing agreement with HUD.

Failure to do so would jeopardize the department's receipt of funding from HUD.

Section 10065. Departmental Appeal

Government Code section 12980(a) authorizes any individual who has been aggrieved by an unlawful housing practice to file a complaint of discrimination with the department. Government Code section 12980(c) instructs the department to "proceed upon [a housing discrimination] complaint in the same manner and with the same powers" applicable to employment discrimination complaints. Pursuant to Government Code section 12971 pertaining to employment discrimination complaints, whenever the department closes a complaint after it has been served on a respondent, it must give prompt notice of this fact to both the complainant and respondent.

This regulation implements, interprets and makes specific sections 12971 and 12980 of the Government Code by articulating the process by which an aggrieved party may request that the department reconsider its rejection of the aggrieved party's complaint or closure of his or her case.

This regulation is necessary because it both informs the public and formalizes the procedure by which an aggrieved party may request that the department reconsider its case closure or rejection of the aggrieved party's complaint. The FEHA is silent on a party's request for appeal or reconsideration, although it is matter that arises with some frequency for complainants. A step-by-step procedure for appealing complaint rejections and case closures is necessary to ensure that a complainant has been afforded every opportunity to have his or her complaint fully and fairly investigated by the department. It also is necessary to provide the complainant and the department closure. This regulation will help ensure that parties are aware of their rights and responsibilities—and the department's obligations—with respect to internal appeals.

Section 10066. Substantial Equivalence

Pursuant to a work-sharing agreement between the DFEH and HUD, the FEHA must provide rights and remedies that are substantially equivalent to those afforded by the Fair Housing Amendments Act of 1988 (42 U.S.C. § 3601 et seq.) and its implementing regulations (24 CFR Parts 100 et seq.) for the department to retain HUD certification and continue to receive funding from HUD. Pursuant to Government Code section 12955.6, the FEHA may not be construed to afford fewer rights and remedies than those afforded under the federal Fair Housing Amendments Act and its implementing regulations, although it may be construed to provide greater rights and remedies.

This regulation implements, interprets and makes specific Government Code section 12955.6 by articulating that the provisions of the FEHA affording remedies to victims of housing discrimination must be construed to afford the same remedies as those afforded under the federal Fair Housing Amendments Act (**FHA**) and its implementing regulations, unless those afforded by the FEHA are greater.

This regulation is necessary because it both informs the public and clarifies that the FEHA's housing provisions must be construed to afford the same remedies as those provided under the FHA, unless the FHA provides greater rights than the FEHA. The FEHA makes no mention that its protections must be substantially equivalent to those of the FHA, an omission this regulation would correct.